United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7190

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CLAUDE L. HUNTLEY, JR.,

Appellant,

VS

COMMUNITY SCHOOL BOARD OF BROOKLYN, NEW YORK DISTRICT NO. 14 and WILLIAM R. ROGERS in his official capacity as Community Superintendent of District #14,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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MISCELLANEOUS

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APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

QUESTION. PRESENTED

WHETHER THE APPELLANT'S TERMINATION FROM HIS SUPERVISORY POSITION AS PRINCIPAL OF INTERMEDIATE SCHOOL #33 IN BROOKLYN, NEW YORK SCHOOL DISTRICT #14 VIOLATED HIS CONSTITUTIONAL RIGHTS AS GUARANTEED TO HIM BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT THE APPELLANT HAS A CONSTITUTIONALLY PROTECTED INTEREST FOR WHICH A QUANTUM OF DUE PROCESS MUST BE AFFORDED

WHETHER THE APPELLANT HAS A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST FOR WHICH HE SHOULD HAVE BEEN AFFORDED A QUANTUM OF DUE PROCESS PRIOR TO HIS TERMINATION

WHETHER THE APPELLANT HAS A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST FOR WHICH HE SHOULD HAVE BEEN AFFORDED A QUANTUM OF DUE PROCESS PRIOR TO HIS TERMINATION

WHETHER THE APPELLANT HAS A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN THAT HE HAD A REAL AND OBJECTIVE EXPECTANCY OF CONTINUED EMPLOYMENT

WHETHER THE APPELLANT HAS A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST BY THE FACT THAT HE IS A BLACK PERSON AND IN VIEW OF THE CIRCUMSTANCES UNDER WHICH HE WAS HIRED (PURSUANT TO AFFIRMATIVE ACTION) AND THE HISTORICAL AND JUDICIALLY ACKNOWLEDGED INSTITUTIONAL DISCRIMINATION WHICH HAS EXISTED IN THE NEW YORK CITY SCHOOL DISTRICT AND WHICH HAS HISTORICALLY DENIED BLACK PERSONS ACCESS TO AND OPPORTUNITY FOR SUPERVISORY POSITIONS WITHIN SAID SCHOOL SYSTEM

WHETHER THE METHODS UTILIZED TO TERMINATE THE APPELLANT AND THE CIRCUMSTANCES OTHERWISE SURROUNDING THE SAME WERE SO MORALLY DEFECTIVE AND, FOR THAT MATTER, SO FACIALLY UNEQUAL TO THE METHODS UTILIZED TO TERMINATE A NON-TENURED WHITE EMPLOYEE OF THE DISTRICT, THAT THE PROCESS OF TERMINATING THE APPELLANT,

habits and dependability [sic] [did] not merit his continuance

QUESTIONS PRESENTED

ITSELF, WAS DESIGNED TO, AND HAD THE ACTUAL EFFECT OF, PUBLICLY STIGMATIZING AND RIDICULING THE APPELLANT, THEREBY INFRINGING UPON BOTH HIS LIBERTY AND PROPERTY INTEREST, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

WHETHER THE APPELLANT WAS ACCORDED DUE PROCESS AS SUCH HAS BEEN DEFINED BY THE FEDERAL JUDICIARY AND THE UNITED STATES SUPREME COURT.

WHETHER THE APPELLANT'S TERMINATION FROM HIS POSITION AS PRINCIPAL OF INTERMEDIATE SCHOOL #33 IN BROOKLYN, NEW YORK COMMUNITY SCHOOL DISTRICT #21 WAS ARBITRARY, CAPRICIOUS AND RACIALLY DISCRIMINATORY AND, ACCORDINGLY, IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CIVIL RIGHTS ACT OF 1866 (42 U.S.C. §1981)

STATEMENT OF CASE

The Appellant is a Black American citizen who resides with his family in Roosevelt, Long Island, New York and who is presently employed by the New York City School District in a teaching and counseling capacity.

From July, 1970 through June 5, 1973, the Appellant was employed by the New York City School District as principal of Intermediate School #33 in Brooklyn, New York Community School District #14 which is an entity within and part of the larger New York City School District. He was the first person of his race to hold the position of principal in Community School District #14 or the schools which otherwise comprise Community School District 14, said District having just recently been created under the decentralization law of the State of New York. He was hired as principal because he is a Black person and pursuant to an affirmative action effort undertaken by Community School Board #14. On June 5, 1973, just prior to the close of the 1972-1973 school year, the Appellant was fired from his job.

Believing that his termination from his position as principal was arbitrary, capricious and racially discriminatory, the Appellant filed suit in the United States District Court for the Eastern District of New York alleging that his termination violated his rights as guaranteed by the Due Process

and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Thereafter, the Complaint was amended to add the individual Community School Board members, in their official capacities, as party Defendants; and a trial on the merits of the Appellant's claims was held with the Honorable Jack B. Weinstein, United States District Judge for the Eastern District of New York, presiding.[1]

On February 19, 1975, the Court below entered a Memorandum and Order dismissing the Appellant's Complaint with costs and disbursements to the Defendants. In dismissing the Complaint, the Court below held that, as a matter of law, the Appellant was not entitled to a hearing before his services were terminated; and that, as a matter of law, the Appellant was not discriminated against, because of his race, when his services were terminated.

Believing that the District Court committed error in holding as it did, the Appellant filed a Notice of Appeal to this Court on March 12, 1975.

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[1] Prior to the trial, the Court below denied the parties' cross-motions for summary judgment.

ARGUMENT

I. THE APPELLANT'S TERMINATION FROM HIS SUPERVISORY POSITION AS PRINCIPAL OF INTERMEDIATE SCHOOL #33 IN BROOKLYN, NEW YORK SCHOOL DISTRICT #14 VIOLATED HIS CONSTITUTIONAL RIGHTS AS GUARANTEED TO HIM BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT THE APPELLANT HAS A CONSTITUTIONALLY PROTECTED INTEREST FOR WHICH A QUANTUM OF DUE PROCESS MUST BE AFFORDED

A. THE APPELLANT HAS A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST FOR WHICH HE SHOULD HAVE BEEN AFFORDED A QUANTUM OF DUE PROCESS PRIOR TO HIS TERMINATION

In Birnbaum v. Trussel, 371 F.2d 672 (2nd Cir. 1966), this Court, while holding "that public employees. . .have no absolute right to a hearing on discharge from public employment. . .," Id. at page 677, nevertheless held that, where there is something more involved than merely the loss of the "privilege"[2] of public

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[2]Appellant submits that employment is more than a privilege and in fact, tends toward the concept of a "fundamental" or "basic" right. See: Williams v. SanFrancisco Unified School District, 340 F.Supp. 438 (N.D. California 1972), where the Court appeared to rely on the fact that "there is some support for the theory that the right to employment is fundamental or basic. Truax v. Reich, 239 U.S. 33, 41 (1915); Sail'er Inn, Inc. v. Kirby, 485 P. 2d 529, 3 FEP cases 550 (1971)." Bravo v. Bd. of Education of the City of Chicago, ___F.Supp. ___(N.D. Ill., July 7, 1972) reported in 4 FEP cases 994. See also: Slochower v. Board of Higher Education of the City of New York, 350 U.S. 551, 555, 76 S.Ct. 637, 639-640, 100 L.Ed. 692 (1956), where the Supreme Court stated:

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employment, the discharge cannot be effectuated arbitrarily and without procedures calculated to determine whether legitimate grounds do exist for the governmental action taken. See: Roth v. Board of Regents of State Colleges, 446 F.2d 806 (7th Cir. 1971) (the interest of preserving the reputation of a nontenured professor);[3] Holliman v. Martin, 330 F.Supp. 1 (W.D. Va. 1971)

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2 (cont'd)

> "To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities."
>
> * * *
>
> ". . .[T]he State must conform to the requirements of due process." (Emphasis added).

The Court in Williams, supra, stated at page 448 that:

> "The Plaintiff herein has asserted the basic right to employment free of invidious discrimination." (Emphasis added).

[3] In this regard, the Court in Roth stated at page 809 that:

> "We think the district court properly considered the substantial adverse effect nonretention is likely to have upon the career interests of an individual professor and concluded, after balancing it against the governmental interest in unembarrassed exercise of discretion in pruning a faculty, that affording the professor a glimpse at the reasons and a minimal opportunity to test them is an appropriate protection."

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(the interest of preserving professional reputation and the ability to pursue a career effectively); Newcomer v. Coleman, 323 F.Supp. 1363 (D.C. Conn. 1970) (the interest in preserving a reputation jeopardized by summary dismissal). In Thompson v. Madison County Board of Education, 476 F.2d 676, 679 (5th Cir. 1973), the Court stated:

> ". . .[I]f the school board bases the non-renewal of the teacher's contract on a charge that implicates the teacher's interest in liberty or property, he must be afforded an opportunity to refute the charge before the school officials. Board of Regents v. Roth, 1972, 408 U.S. 564, 573, 92 S.Ct. 2701, 33 L.Ed.2d 548; Perry v. Sindermann, 1972, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570."

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3 (cont'd)

In reversing, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548, 558 (1972), the Supreme Court stated:

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty or immorality. Had it done so, this would be a different case, for '[w]here a person's good name, reputation, honor, or integrity is at state because of what the government is doing to him, notice and an opportunity to be heard are essential.' Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515;. . .[other citations omitted]." (Emphasis added).

See: Abbott v. Thetford, 354 F.Supp. 1280, 1288 (M.D. Alabama 1973) where the Court stated:

> "In Birnbaum v. Trussell, (2 CCA 1966), 371 F.2d 672, 678; Newcomer v. Coleman, 323 F.Supp. 1363; and Hunter v. City of Ann Arbor, 325 F.Supp. 847, 854, the rule is expounded that, in removal-from-public-employment cases,
>
> '***whenever there is a substantial interest, other than employment by the state, involved in the discharge of a public employee, he can be removed neither on arbitrary grounds nor without a procedure calculated to determine whether legitimate grounds do exist.' (Emphasis added).
>
> In Hunter, there were two substantial interests involved other than employment--reputation and the ability to pursue a profession effectively. This Court finds that Abbott's interest involve his desire to obtain adequate facilities for the care of neglected black juveniles, the desire for continued employment by the State, and his reputation. Abbott, therefore, meets the 'substantial interest' test of Birnbaum and Hunter."

In Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1938, 32 L.Ed. 2d 556 (1972), the Supreme Court rejected the argument that a substantial interest requiring due process protection encompasses only absolute necessities of life such as were found in Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (welfare benefits) and Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) (wages). In that regard the Court said at pages 574-575:

"This reading [the lower court's] of Sniadach and Goldberg reflects the premise that those cases marked a radical departure from established principles of procedural due process. They did not. Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect [footnote omitted]. E.g., Opp. Cotton Mills v. Administrator, 312 U.S. 126, 152-153, 85 L.Ed. 624, 639, 640, 61 S.Ct. 524, United States v. Illinois Cent. R.Co.,291 U.S. 457, 463, 78 L.Ed. 909, 917, 54 S.Ct. 471; Southern Ry. Co. v. Virginia, 290 U.S. 190, 77 L.Ed. 260, 54 S.Ct. 148; Londoner v. City & County of Denver, 210 U.S. 373, 52 L.Ed. 1103, 28 S.Ct. 708; Security Trust Co. v. Lexington, 203 U.S. 323, 51 L.Ed. 204, 27 S.Ct. 87; Central of Georgia v. Wright, 207 U.S. 127, 52 L.Ed. 134, 28 S.Ct. 47; Hibben v. Smith, 191 U.S. 310, 48 L.Ed. 195, 24 S.Ct. 88; Glidden v. Harrington, 189 U.S. 255, 47 L.Ed. 798, 23 S.Ct. 574. In none of those cases did the Court hold thatthis most basic due process requirement is limited only to the protection of only a few types of property interest. While Sniadach and Goldberg emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine (footnote omitted). Nor did they carve out a rule of 'necessity' for the sort of nonfinal deprivations of property that they involved. That was made clear in Bell v. Burson, supra, holding that there must be an opportunity for a fair hearing before mere suspension of a driver's license. A driver's license clearly does not rise to the level of 'necessity' exemplified by wages and welfare benefits. Rather, as the Court accurately stated, it is an 'important interest,' 402, U.S., at 539, 29 L.Ed.2d at 94, entitled to the protection of procedural due process of law." (Emphasis added).[4]

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[4]See: Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424, 429 (1972) where the Supreme Court said:

(cont'd on next page)

A substantial interest may therefore take on several forms. In Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 27 L.Ed.2d 515, 519 (1971), Justice Douglas, speaking for the majority stated:

> "Where a person's good name, reputation, honor, or integrity is at state because of what the government is doing to him, notice and an opportunity to be heard are essential. 'Posting' under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." (Emphasis added).

In Birnbaum v. Trussel, supra, the employee's "substantial interest" was his termination without a hearing, coupled with public exposure, which the Court stated:

> ". . .permanently brands the person accused as one who is unable to put public and professional duty above personal bias. In this case, it was well calculated to injure appellant's career as a physician both in private and public practice."

Id. at page 679.

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4 (cont'd)"This court has never adopted the distinction between personal liberties and proprietary rights as a guide to the contours of §1343 (3) jurisdiction [footnote omitted]. Today we expressly rejected that distinction.

Neither the words of §1343 (3) nor the legislative history of that provision distinguish between personal and property rights."

A fortiori, Appellant submits that being publicly branded, among other things, as an "ineffective" and "uncommunicative" administrator and a principal who "has failed to maintain a reasonably functional educational plant that is conducive to an effective learning environment" places on him a badge of inferiority and incompetence which totally permeates his ability to pursue a livelihood as a principal or other supervisor in the New York City School District or elsewhere and which, otherwise, interferes with his normal human relationships with his peers.

It is important to direct the Court's attention to the letter of June 1, 1973 from Appellee Rogers to members of the Community School Board in District #14 (See: Appendix at page 12). Said letter, which requests the removal of the Appellant from his position as Acting principal, is replete with references to Appellant's conduct in his official capacity. Appellant is accused, among other things, of failing to effectively deal with the educational program at I.S. 33, failing to implement an effective education program, failing to provide for the basic safety of the children and staff of the school, failing to maintain a reasonably functional educational plant conducive to an effective learning environment, failing to resolve problems that occurred in the administration and supervision of the school, failing to anticipate problems and implement action that would provide a reasonable instructional atmosphere, and failing to utilize the additional resources that were provided to create an effective school program.

The letter states that the Appellant did not communicate as an educational and administrative leader, did not provide a viable educational program, was ineffective in implementing recommendations and suggestions to improve the educational climate of the school, and demonstrated an inability to provide the necessary leadership in working with a staff of professional teachers and supervisors.

As a result, the letter states that the school situation has "rapidly deterioated," the leadership of the Appellant "has created a climate of confusion and discontent in the school" and "the educational climate of the school is now one of general disorder this depriving many children of a proper and effective learning situation."

It is hard to imagine a letter that could be more devastating to a school administrator's career than the letter written by Appellee Rogers about the Appellant submitted to the Community School Board and, in fact, read at a public meeting.

Appellee Rogers' intention was obviously to convey the impression that the Appellant had been <u>personally</u> responsible for a situation bordering on chaos and anarchy. It can hardly be argued that the Appellant would not be fatally stigmatized in the eyes of any future prospective employer who might view the letter. Accordingly, the letter must be viewed as effectively foreclosing any potential job opportunity which the Appellant might seek as a school administrator.

It is important to note at this juncture that the Appellant is not required to show that he has actually been injured by the letter of Appellee Rogers. In Suarez v. Weaver, 484 F.2d 678 (7th Cir. 1974), a letter of termination was sent to a physician at a public hospital informing him of his discharge because had allegedly been prescribing large volumes of narcotic and dangerous type drugs for his patients. The Court noted that the letter remained in the physician's file and held that due process protection was warranted because the charge "sufficiently implicated plaintiff's reputation as a practicing doctor and citizen." Id. at page 681. The Court stated that the mere fact that this letter was on file was sufficient proof of injury to plaintiff's reputation. It stated:

> "In Updegraff, for example, the Supreme Court took judicial notice of the injury to plaintiff's reputation which would probably result from the charge of belonging to a subversive organization and then concluded that the due process protection was warranted. As in Constantineau, no evidence of actual injury to Plaintiff's reputation was required."

Id. at page 680.

Virtually every sentence in the above-mentioned letter, written by Appellee Rogers about Appellant Huntley, is spiked with damning statements which reflect negatively upon every aspect of a school principal's duties and responsibilities. Of particularly damaging content is the allegation that Plain-

tiff was engaging in conduct (whether negligently or intentionally) which endangers "the basic safety" of school children and the staff of the school.

The Appellant has essentially been accused of criminal conduct.[5] Surely such charges are sufficient to permenantly ruin any chance Appellant might foreseeably have to obtain another position as a principal. It is this sort of "arbitrary vilification" which the Fourteenth Amendment is designed to protect against. Boulware v. Battaglia, 327 F.Supp. 368 (D.C. Del. 1971). "Stimatization constitutes a deprivation of liberty in the constitutional sense." Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974). There is a little doubt but that a person's interest in his reputation,is sufficient to trigger procedural due process." Suarez v. Weaver, supra. Protectable interests in reputation as delineated in Wisconsin v. Constantineau, supra and Board of Regents v. Roth, supra, should not be confined to those situations involving alleged sexual debauchery and alcoholic indiscretion.

Apart from Suarez, supra, other cases have used the term "reputation" in a broader sense. In Whitney v. Board of Regents, 355 F.Supp. 321 (E.D. Wis. 1973) a teacher was ter-

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[5]Reckless Endangerment, New York Public Law §120.20.
Official Misconduct, New York Public Law §195.00.

minated with the charge of being an inadequate and incompetent faculty member. The Court held:

> "I find that the charges of inadequacy and immaturity were likely to injure the plaintiff's reputation, and that, therefore, he was entitled to a public hearing to clear his name."

See also: Wellner v. Minnesota State Junior College Board, 487 F.2d 153 (8th Cir. 1973) (non-tenured faculty member, not reappointed due to "racist" charges made against him and put in his file, was entitled to a hearing); Meredith v. Allen County War Memorial Hospital, 397 F.2d 33 (6th Cir. 1968) (physician at public hospital denied reappointment for "general uncooperativeness, refusal to handle emergency cases, and dismissal from various medical associations," was held entitled to a hearing); Birnbaum v. Trussell, supra (discharge for alleged racial prejudice); Boulware v. Battaglia, supra (policemen charged with neglecting to report violations of rules and regulations and conduct unbecoming an officer); Carpenter v. City of Greenfield School District, No. 6, 358 F.Supp. 220 (E.D. Wis. 1973) (teacher dismissed, because she allegedly screamed at a pupil, entitled to hearing to clear her reputation).

In Wilderman v. Nelson, 467 F.2d 1173 (8th Cir. 1973), the plaintiff therein was a welfare case worker who had been discharged on the grounds that he was "unable or unwilling to perform the duties of the position satisfactorily, or that his

habits and dependibility [sic] [did] not merit his continuance in the service." The District Court had granted the Defendants' Motion for Summary Judgment. The Court of Appeals reversed, noting that the Plaintiff's Complaint and Affidavit suggested that he had difficulty in finding alternative employment as a result of the charge against him. The Court stated:

> "The record here, though incomplete, contains evidence tending to show state action imposing a stigma upon Wilderman which may effect his future employment opportunities. Therefore the district court was not justified in summarily dismissing Wilderman's complaint insofar as it alleged a right to a pretermination hearing."

Id. at page 1174.

Appellant submits to this Court that, as important as an interest in a driver's license is essential to the pursuit of a livelihood, Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 2d 90 (1971), and as important as an interest in a stove or bed is essential to the maintenance of a minimally decent life, Fuentes v. Shevin, supra, of even greater importance is one's reputation for competence in one's chosen profession, a reputation which is essential both to the pursuit of a livelihood and the maintenance of at least a minimally decent life.

It is quite clear that, in the circumstances surrounding the Appellant's summary adjudication of "incompetence," more was involved than merely the loss of a "privilege of public employment." The cause of the adjudication, the methods used

to execute the same, and the consequences thereof bear significantly upon the Appellant's reputation and his ability to pursue his chosen profession in a supervisory position in the public school system--in short, his "right to life." See: Birnbaum v. Trussel, supra at page 677:

> "Since Justice Holmes, then the Massachusetts Supreme Judicial Court, said, '[T]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman, [footnote omitted] the courts have become more inclined to consider the causes of discharge and the methods and procedures by which a dismissal is effected as it may bear upon reputation and the opportunity for employment thereafter. It is quite clear that, in the circumstances surrounding Dr. Birnbaum's removal from office more was involved than merely the loss of the privilege of public employment. See Wieman v. Updegraff, 344 U.S. 183, 190-191, 73 S.Ct. 215, 97 L.Ed. 216 (1952). As was said in a similar context, even if working for the government is regarded as no more than a privilege, a discharge for disloyalty or for doubt about loyalty may involve such legal rights as those in reputation and in eligibility for other employment [footnote omitted]."

In Bottcher v. State of Florida Dept. of Agr. & Con. Service, 361 F.Supp. 1123, 1129 (N.D. Florida 1973), the Court in discussing Roth, supra, stated:

> "Roth, supra, concluded that requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. In determining the form of hearing, if any, required by due process standards, the courts have been required to look at the nature of the

> interest at stake, Roth, supra, 408 U.S. at 571, 92 S.Ct. 2701. In this vein Roth, supra, made clear that 'property interests' subject to procedural due process protection are not limited by a few rigid technical forms. Perry v. Sindermann, supra, 408 U.S. at 601, 92 S.Ct. at 2699. In examining the petitioner Roth's claims in light of those principles of law fashioned by the Court, the writer observed that in that case 'there is no suggestion whatever that the respondent's interest in his 'good name, reputation, honor, or integrity' is at state.' Roth, supra, 408 U.S. at 573, 92 S.Ct. 2701. In the case sub judice there are specific allegations made by plaintiff to this effect. Additionally. in Roth the writer found that 'there is no suggestion that the State***imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.' Ibid. Plaintiff's very argument in the instant action is that the letters of defendant Stewart placed in her personnel file have foreclosed or diminished her opportunities for occupational advancement and as such constitute a distinct threat to a protected property interest to which the protections of due process apply."

In Buggs v. City of Minneapolis, 358 F.Supp. 1340 (D.C. Minn. 1973), the Plaintiffs were merely suspended from their respective positions, not terminated. Citing the Supreme Court's decisions in Roth, Constantineau, and Sindermann, supra, as authority, the Court held their suspensions[6] unconstitutional on due-process grounds and stated:

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[6] "[P]laintiffs were suspended pursuant to Rule 10.01 of the Rules of the Civil Service Commission of the City of Minneapolis which expressly denies a hearing to any employee, probationary or not, suspended on disciplinary reasons. ..." Buggs, supra at page 1341.

"It is not disputed that plaintiffs were suspended as alleged; neither is it refuted that the suspensions were ordered without prior notice and without an opportunity to be heard. Therefore the case is susceptible to partial disposition by summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The legal issue for real consideration then is whether plaintiffs were denied procedural due process in proceedings resulting in their suspension. This question would appear to be controlled by the recent decisions of Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and numerous cases cited therein. Roth reiterated the standards set out in Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971):

> 'Where a person's good name reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'

The Court finds that, regardless of defendants' position regarding the power to appoint, the charges preferred against the plaintiffs alleging 'gross misconduct, insubordination and hostile attitude towards fellow employees, both superior and subordinate', are sufficient to call into play the Roth and Constantineau requirements. The Court is unimpressed by the affidavit evidence that the copies of the charges placed in plaintiffs' personnel files are not available for general inspection. Additionally, Constantineau makes no exception for circumstances where information pertaining to situations in which due process is denied is sequestered thereafter. Further, the court is not convinced that personnel records are compiled but never reveiwed. It is a near certainty that plaintiffs' former supervisor who ordered the suspensions or others will in the future be consulted by any person investigating plaintiffs' past employment records. Plaintiffs have had serious charges leveled at them and have

> suffered adverse action as a result of those charges without an opportunity to be heard. The court finds in accordance with the cases cited above that Plaintiffs' constitutional right to due process has been infringed and that relief must be granted accordingly. It is immaterial whether the copy of the notice given to plaintiffs containing the charges against them be construed as adequate to meet the requirement of 'written reasons' for the suspension. Because advance notice and an adequate opportunity to be heard was denied, that question need not be considered here."

Id. at pages 1342-1343.

The Court's discussion of due process in a teacher dismissal matter in Ortwein v. Mackey, 358 F.Supp. 705 (M.D. Fla. 1973) is particularly instructive herein. Judge Krentzman stated:

> "The second area outlined by Roth as giving rise to a possible claim of deprivation of liberty is much more applicable to this case. Such a claim may be made out where the government, in declining to re-employ an individual, imposes upon him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. Roth 92 S.Ct. at 2707. The Court noted:
>
> > 'The State, for example, did not involve any regulations to bar the respondent from all other public employment in State universities. Had it done so, this, again, would be a different case.' For '[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury. . .' Roth 92 S.Ct. at 2707, quoting joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951).

In a footnote to this discussion, however, the Roth Court gave an example of that which does not constitute a deprivation of liberty in this context. The Court stated:

> 'The District Court made an assumption 'that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career.' D.C. 310 F. Supp. 972, at 979. And the Court of Appeals based its affirmance of the summary judgment largely on the premise that 'the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor' amounts to a limitation on future employment opportunities sufficient to invoke procedural due process guarantees. 446 F.2d [806] at 809 (7 Cir.). . . [T]he record contains no support for these assumptions. There is no suggestion of how non-retention might affect the respondent's future employment prospects.' Roth 92 S.Ct. at 2708, f.n. 13.
>
> The facts in the instant case obviously fall somewhere between the extremes cited by the Supreme Court. A nontenured faculty member at the University of South Florida can be terminated (i.e., not re-hired) at the discretion of the President. If plaintiff had simply failed to be re-hired without an explanation it would be difficult, under the language quoted above, to find any deprivation of plaintiff's liberty. It must be remembered, however, that in terminating plaintiff, the letter of December 14, 1970, listed reasons such as 'lack of performance in the functional program' and failure to substantially contribute to the University outside the limited area of tennis instruction. These reasons, while not constituting an attack upon the integrity of the plaintiff, do create a 'stigma' concerning future employment at the university level, and indeed, in the area of education." (Emphasis added).

Id. at pages 712-713.

In the instant case, the charges preferred against the Appellant are so pervasive, damning, and stigmatizing that they must "call into play the Roth and Constantineau requirements." Buggs, supra at pages 1342-1343.

See also: McNeil v. Butz, 480 F.2d 314 (4th Cir. 1973), where the Court was presented with the issue of whether procedural due process rights are applicable to the dismissal "of a non-civil service federal employee who has no employment contract." Id. at page 318. In holding that such rights are applicable, the Court stated:

> "Procedural due process rights attach where state action condemns a person to 'suffer grievous loss of any kind.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 647, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring); Goldberg v. Kelly, 397 U.S. 254, 262-263, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Cf. Hannah v. Larche, 363 U.S. 420, 441-442, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960). The Supreme Court has recently addressed the question of procedural due process rights for untenured state employees in Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). See Chitwood v. Feaster, 468 F.2d 359 (4 Cir. 1972); Johnson v. Fraley, 470 F.2d 179 (4 Cir. 1972). Roth is controlling in this case. Sindermann is only of collateral interest, since it dealt primarily with the question of when a teacher, not having formal tenure, may claim quasi-tenure. No such claim is made in either of the instant cases.
>
> In Roth, supra, the Court held that a non-tenured teacher who has been employed for one year had no due process right to a statement or reasons or a hearing on a state university's decision not to renew his one-year contract, because non-renewal deprived him of neither 'liberty' nor 'property.'

> Although the Court held that an ordinary dismissal or failure to reemploy does not infringe the broad guarantee of 'liberty,' it explained that '[t]here might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated.' 408 U.S. at 573, 92 S.Ct. at 2707. The Court suggested that liberty might be implicated if the state made charges against the employee which 'might seriously damage his standing and associations in his community,' as, for example, accusations of dishonesty, disloyalty or immorality. Ibid. [Footnote omitted]. Thus, 'liberty' is implicated and procedural due process is required when government action threatens an employee's good name, reputation, honor, or integrity. Ibid. See Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952). Secondly, the Court explained that government dismissal may abridge liberty if it imposes a 'stigma or other disability' which forecloses a discharged employee's freedom to take advantage of other employment opportunities. 408 U.S. at 573, 92 S.Ct. 2701 [footnote]."

McNeil v. Butz, supra at pages 318-319.

Continuing the McNeil Court, while rejecting the Plaintiffs' contention that they had an objectively based expectancy of continued employment and therefore a constitutionally protected "property" right, Id. at page 320, nevertheless held that "the government [had] deprived them of 'liberty' by stigmatizing their standing and association in the community." Id. at page 321, and by foreclosing "other government opportunities." Id. at page 320. In that regard the Court stated:

> "Roth teaches that the Fifth Amendment would enjoin the government from so stigmatizing a dismissed employee without providing at least rudimentary due process, unless, of course, as we hereafter discuss with regard to McNeil, the dismissed employee admits his guilt [footnote omitted]. 408 U.S. at 573, 92 S.Ct. 2701.

See Peters v. Hobby, 349 U.S. 331, 351, 75 S.Ct. 790, 99 L.Ed. 1129 (1955) (Douglas, J., concurring); Johnson, 470 F.2d at 185 (Boreman, J., concurring).

The State Committee permanently disqualified both plaintiffs from future ASCS employment. Roth advised that if the state university in that case had barred the teacher from 'all other public employment in state universities. . ., this. . .would be a different case. For '[t]o be deprived not only of present government employment but of future opportunity for it is no small injury.' 408 U.S. at 573, 93 S.Ct. at 2707, quoting joint Anti-Fascist Refugee Committee, 341 U.S. at 185, 71 S.Ct. 624 (Jackson, J., concurring). No proof was adduced at trial regarding the plaintiffs' future employment prospects. Although disqualification from ASCS may be a rather narrow disability, we can safely surmise that the stigma attached to such disqualification will effectively foreclose other government employment opportunities [footnote omitted]. We think it fair to assume that Plaintiff's private employment prospects will also be prejudiced. Roth cautions that '[m]ere proof, for example, that his record of non-retention in one job, taken alone, might make him some what less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.' 408 U.S. at 574 n. 13, 93 S.Ct. at 2707. But that warning was written in the context of a facially neutral failure to re-employ. Therefore, ASCS disqualification may present the type of stigma or disability which Roth contemplated would deprive a discharged untenured employee of liberty. See Snead v. New York City Dept. of Social Services, 355 F. Supp. 764 (S.N.Y. 1973). However, since the undeveloped state of the record compels us to base our analysis more on supposition than on established facts, we decline to rest our decision that procedural due process rights attach solely on the ground of loss of future employment opportunities. Nevertheless, it seems certain that more than loss of good name, reputation, honor, and integrity is at state." (Emphasis added).

Id. at page 320.

The facts herein, rather than a supposition, indicate that, since the Appellant's termination as principal of Intermediate School #33 in Brooklyn, New York School District #14, he has sought, on three ocassions, to obtain three similar supervisory positions; and that on all three ocassions he was rejected for the same (See: Paragraph 31(a) in Plaintiff's Affidavit at page 816 of the Appendix).[7] It must be reasonably, though tragically, concluded that the Appellant herein has been and will continue to be foreclosed forever from pursuing his chosen profession and attaining his lot in life. That such is attributable to the less than "facially neutral" termination cannot be disputed; and as such the Appellant has acquired "the type of stigma. . .which Roth contemplated would deprive a discharged untenured employee of liberty." McNeill, supra at page 320. See also: Birnbaum v. Trussell, supra. That he is

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[7] Depositions of persons who sought out and screened applicants for the specific supervisory positions alluded to, all indicate that the Appellant was "screened" out early in the process; that he was never seriously considered for the respective jobs; and that no investigations of his qualifications were undertaken. Nevertheless, there can be no doubt but that, if more thorough investigations had been undertaken, the Appellant would have undoubtedly been eliminated from any further consideration for the vacant supervisory jobs, solely on a reading of Appellee Rogers' letter, as such letter exists in the Appellant's file. A conclusion otherwise (that the Appellant would not have been instantly eliminated from further consideration for the supervisory position, based on the letter, alone) is totally unrealistic and unfounded.

still free to pursue a teaching profession can be of little solace to this highly qualified and aspiring Appellant; and it cannot, and should not, be relied upon by this Court as an excuse for avoiding the "stigma" which has been attached to the Appellant and which has had the effect of depriving him of his "liberty" to pursue his goals in life.

B. THE APPELLANT HAS A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST FOR WHICH HE SHOULD HAVE BEEN AFFORDED A QUANTUM OF DUE PROCESS PRIOR TO HIS TERMINATION

1. THE APPELLANT HAS A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN THAT HE HAD A REAL AND OBJECTIVE EXPECTANCY OF CONTINUED EMPLOYMENT

Assuming, arguendo, that Appellant's being labeled and stigmatized incompetent as a principal, in the pervasive and conclusory manner in which it was done, is not cognizable as a "substantial interest" in that it is not found to injure him in his standing among his colleagues and/or in his ability to obtain future employment in that capacity, a finding which Appellant makes only for argument sake and which on its face is patently absurd, the Supreme Court and the Second Circuit have recognized that the expectancy of reemployment is a "substantial interest" to be constitutionally protected. See: Perry v. Snidermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 570 (1973); Romar v. Keyes, 162 F.2d 136, 139 (2nd Cir. 1947), Cert. denied 332 U.S. 825, 68 S.Ct. 166, 92 L.Ed. 400 (1947) where the Court stated:

". . .[I]t may have been the termination of an expectancy of continued employment, and that is an injury to an interest which the law will protect against invasion by acts themselves unlawful, such as the denial of a federal priviledge." (Emphasis added).

See also: Ferguson v. Thomas, 430 F.2d 85 857 (5th Cir. 1970) where the Court stated:

"The substance of due process requires that no instructor who has an expectancy of continued employment be deprived of that expectancy by more ceremonial compliance with procedural due process." (Emphasis added).

Prior to the action taken against the Appellant by the Appellees herein, the Appellant had been employed as the principal at Intermediate School #33 in Brooklyn, New York School District #14 for almost three (3) years (1970-71 through 1972-73). See: Testimony at page 167 of Appendix.

Appellees contend that, because he was denominated as an "acting principal" at the commencement of his employment, any expectancy of employment which he arrived at was purely subjective[8] and therefore not a sufficient "property" interest under the Due Process Clause of the Fourteenth Amendment.

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[8] In Perry v. Sindermann, supra at page 603, the Court stated:

"We disagree with the Court of Appeals insofar as it held that a mere subjective 'expectancy' is protected by procedural due process."

However, in the instant case the denomination is misleading; and any reliance on the same to cancel out the "legitimacy" of the Appellant's claim to a reasonable expectancy of employment ignores the several factors which did exist and do justify the Appellant's position.

Notwithstanding the denomination which the Community School Board members placed on the Appellant at the time he was hired in July, 1970, he obviously met "criteria satisfactory to them," Chance v. Board of Examiners and Board of Education of the City of New York, 458 F.2d 1167, 1179 (2nd Cir. 1972), at that time.[9] See: Testimony at page 503 of Appendix. Their satisfaction was well founded in view of the Appellant's background (See: Tr. at pages 3-4 as set forth in the Appendix at pages 166-167. See also: Exhibit 1 at pages 823-825 of the Appendix). It goes without extended elaboration that the Appellant would not have been hired at the outset unless he had manifested a high degree of competence. That the Appellees believed the same is manifested by the fact "that Brother Lally and other members of the Board risked citation for a contempt of court in defying an injunction obtained in a proceeding to declare the Appellant's appointment illegal." See: "Report to the Chancellor," attached to Appel-

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[9] The Appellant was obviously one of the "many minority group acting supervisors already selected by local boards because of their ability to perform." Chance, supra at page 1178.

lees' Answer, at page 17 (at page 17 of the Appendix). While the report indicates "that the Board risked judicial punishment to put the Appellant in office and keep him there because they felt that the appointment was right and that they must stand up for their principles," Ibid., they obviously felt that the Appellant was highly qualified to assume the position and carry out the duties of principal at Intermediate School #33 in Brooklyn, New York School District #14. Moreover, their initial judgment seemed to be borne out by the fact that the Appellant received satisfactory ratings at the end of each of his years in his position, save for his very last year when he was prematurely dismissed only approximately three weeks prior to the end of the academic year. In fact, Appellee Rogers, himself, had rated the Appellant satisfactory at the end of the previous academic year (1971-1972) despite the fact that he could have rated the Appellant "doubtful" or "unsatisfactory;" and his failure to do the latter served only to reinforce the Appellant's legitimate expectancy of continued employment. See: Exhibit 2 at pages 825-828 of Appendix.

Appellant submits that, coupling the length of his employment with the fact and circumstance of his intitial appointment, itself, the extents to which the Board went to make the appointment and enforce it, the satisfactory ratings which he continuously received in his previous performance, including a satisfactory rating by Appellee Rogers, himself, and the circumstances under which he was terminated, he had a real and objective expectancy of continued reemployment, notwithstanding his denomination as an acting principal. He felt he was the principal,

in fact; the Parent Association felt that he was the principal, in fact; and he had no reason to expect that he would be precipitously fired as, in fact, he was. He realistically and objectively expected to be functioning as principal of Intermediate School #33 in Brooklyn, New York Community School District #14 in the 1973-1974 academic year and certainly to the end of the 1972-1973 academic year which was only approximately three weeks off. The latter is particularly so in view of the fact that on May 25, 1973, when the Appellant was initially but illegally terminated by the Community School Board, he had met, in a closed executive session, with the Board and the Superintendent to discuss a proposed reorganization of Intermediate School #33 for the following year; and no one even alluded to the possibility of his termination. See: Discussion infra at pages 33-34.

In short, the words and actions of others, particularly the Appellees, justify the conclusion that the Appellant arrived at -- that he had a legitimate and objective expectancy of continued reemployment at least until the end of the 1972-1973 school year, which was then in process, if not for the following academic year. See: Perry v. Sindermann, supra at pages 601-602.

2. THE APPELLANT HAS A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST BY THE FACT THAT HE IS A BLACK PERSON AND IN VIEW OF THE CIRCUMSTANCES UNDER WHICH HE WAS HIRED (PURSUANT TO AFFIRMATIVE ACTION) AND THE HISTORICAL AND JUDICIALLY ACKNOWLEDGED INSTITUTIONAL DISCRIMINATION WHICH HAS EXISTED IN THE NEW YORK CITY SCHOOL DISTRICT AND WHICH HAS HISTORICALLY DENIED BLACK PERSONS ACCESS TO AND OPPORTUNITY FOR SUPERVISORY POSITIONS WITHIN SAID SCHOOL SYSTEM

Appellant submits that perhaps the most substantial property and liberty interest which he has and which triggers the necessity for rudimentary due process is the fact that he is a Black person; that one of the significant reasons that he was hired into the position is that he is a Black person (See: Testimony at pages 601-505; 612 of Appendix); and that the New York City School District, generally, and Brooklyn, New York Community School District #14, specifically, have historically discriminated against Black persons in providing access to and opportunity for supervisory positions within the school system (See: Chance v. Board of Examiners, 330 F.Supp. 203 (S.D.N.Y. 1971), Affirmed 458 F.2d 1167 (2nd Cir. 1972). Once having undertaken to eradicate the present effects of their past discrimination by providing limited access to and opportunity for a Black person or persons the Appellees have, as a matter of fact and law, vested a property interest in the Black person or persons hired under the circumstance, requiring them to provide a rudimentary due process hearing in order to assure a meaningful affirmative action, after the fact.

It is evident that tenured minority employees, particularly those in supervisory positions, are grossly under-represented in the the New York City School Districts because of their exclusion until just recently from those positions therein; and to hold that only tenure vests a property interest in supervisory personnel in the New York City School District is to discriminate per se, against Black and other minority individuals.

Appellant submits that the afore-mentioned factors automatically vest a tenure (property) interest in him, at least insofar as due process is concerned; and for the Court to reject this argument is tantamount to its sanctioning something less then a commitment to meaningful affirmative action program which the decision of this Court in Chance v. Board of Examiners, 458 F.2d 1167 (2nd Cir. 1972), Affirming 330 F.Supp. 203 (S.D. N.Y. 1971) implicitly, if not explicitly, mandated. Without due process, where a Black individual, having achieved access to the system, at this late date, is faced with termination, there is little he can do to foreclose a subversion of his appointment and the affirmative action concept under which he gained access, initially. Furthermore, for all practical purposes this minority person is foreclosed forever from ever achieving that or a similar position again.

C. THE METHODS UTILIZED TO TERMINATE THE APPELLANT AND THE CIRCUMSTANCES OTHERWISE SURROUNDING THE SAME WERE SO MORALLY DEFECTIVE AND, FOR THAT MATTER, SO FACIALLY UNEQUAL TO THE METHODS UTILIZED TO TERMINATE A NON-TENURED WHITE EMPLOYEE OF THE DISTRICT, THAT THE PROCESS OF TERMINATING THE APPELLANT, ITSELF, WAS DESIGNED TO, AND HAD THE ACTUAL EFFECT OF PUBLICLY STIGMATIZING AND RIDICULING THE APPELLANT, THEREBY INFRINGING UPON BOTH HIS LIBERTY AND PROPERTY INTERESTS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Not insignificantly, the methods used to terminate the Appellant and the circumstances otherwise surrounding the same were so morally defective and for that matter facially unequal to the

methods utilized and circumstances surrounding the termination of a non-tenured white professional in the District that the process, itself, was designed to and, in fact, did stigmatize the Appellant and hold him up to public ridicule.

In that regard, the Appellant appeared before the Community School Board only a few short days prior to being formally and legally notified of his termination.[10]

When he appeared before the Community School Board, he did so to discuss a proposed reorganization of Intermediate School #33 of which he was principal. At that meeting no mention whatsoever was made of his pending termination; and not one individual Board member questioned him about the alleged "misconduct" for which he would ostensibly be terminated. See: Testimony at pages 221-222 of Appendix. See also: Testimony at pages 338-340 of Appendix.

Immediately after he left the meeting at which he discussed the reorganization of his school, one of the Board members moved to fire the Appellant from his job. The motion was seconded over the objection of the lone minority Board member at the meeting who was the Board liason, as well, to Intermediate School #33 and who had never, himself, been informed of the proposed action.[11]

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[10]The Appellant appeared before the Community School Board, in closed session, on May 25, 1973, only approximately one month prior to the close of the academic school year.

[11]Mr. Leroy Fredericks, a Black man, was the lone minority member at the meeting. There are two other minority Board members on the Board, both of whom are Hispanic. Mr. Fredericks was denominated as nominal Defendant in the action for relief purposes only, said denomination being agreed upon pursuant to a stipulation of the parties (See: Stipulation at page 110 of Appendix). A Board liason is the designated member of the Community School Board assigned to be a conduit between the Community Board, as a whole, the administrator of the School and members of the supervisory staff of the Central office of the Community School District.

The minority member and Board laison to Intermediate School #33 indicated that the Superintendent had not preferred formal charges against the Appellant, as was the normal procedure; and that the entire effort to fire the Appellant at that time was out of order.

Over his objection and after the foregoing transpired, a Community Board member asked Appelle Rogers if he wanted to recommend the Appellant's termination; and Appellee Rogers did so, orally, a procedure never before utilized to fire an employee.

Eventually, the Appellant was terminated at the Executive session of the Board, with the lone minority member thereat refusing to vote for said termination. See: Testimony at pages 338-344 of the Appendix.

When the Appellant was notified of his termination, he appealed the action of the Community School Board, administratively, alleging that his termination, without a resolution at a public meeting, was illegal and void. His appeal was sustained; and the Chancellor of the New York City School District ordered the Community School Board to vote upon the termination at a public hearing. See: Testimony at pages 223-227 of Appendix.

Thereafter, on extremely short notice, the Community School Board scheduled a <u>special</u> public meeting for June 5, 1973.[12] Appellee

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[12]It is submitted that the rush to push the Appellant's termination through, prior to the conclusion of the academic year and in view of the fact that there were only approximately three weeks left to the academic year, is highly suspicious; and supports the Appellant's claim that the process and cir-

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Rogers formally submitted charges against the Appellant in the form of a letter (See: Exhibit 1 at page 12 of the Appendix). The Appellant never received a copy of said letter and only found out about the same through the minority Board member, Leroy Fredericks who had received a copy of the letter, as a Board member, and advised Appellant Huntley of its contents.

At the specially held public meeting, the letter was read in its entirety. Hundreds of people were in attendance. Thereafter, a confused vote was taken; and, ostensibly the Appellant was terminated with Mr. Fredericks voting against the same (See: Testimony of Claude L. Huntley, Jr., at pages 227-228 of Appendix. See also: Testimony of Caroline Hupe at pages 386-387 of Appendix).

As a consequence of this public spectacle, Appellant Huntley was ridiculed and embarrassed; and was the victim of a public stigmatization (See: Testimony of Caroline Hupe, supra).

Interestingly and significantly, a white teacher was terminated from his position early in the 1971-1972 academic year as a consequence of his failure to appear for his duties until substantially after the school year had commenced. The teacher, himself, was under the jurisdiction of Appellant Huntley.[13]

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[12] cumstances of his termination were morally and otherwise defective. Significantly, as a consequence of his premature termination, only approximately three weeks prior to the end of the academic year, a special festival of arts, involving the efforts of the students at Intermediate School #33, was canceled as were the prom and graduating exercises at said school. See: Testimony of Claude L. Huntley, Jr., at pages 225-226 of Appendix.

(See f.n. 13 on next page).

He was given an option to resign rather than to be formally terminated; and, more significantly, it was determined, as a matter of policy by the Community School Board, that the resolution of his termination was not to be published on the public agenda of the Public School Board meeting; and that the agenda should simply read that the Community School Board consider a resolution for dismissal of a probationary teacher. Neither the actual resolution or the teacher's name were to be printed.[14]

There can be no doubt that not only was the Appellant treated differently than a white professional by the Community School Board (evidence of the racially discriminatory conduct of the Appellees) but that the process utilized in terminating the Appellant was contrary to the procedure previously agreed upon by the Community School Board with respect to the white employee. The only conclusion that one can reasonably come to is that the process utilized by the Appellees was designed to and had the actual effect of ridiculing and stigmatizing

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[13]The teacher was on probationary status and was accordingly, non-tenured. See: Exhibit 34 in the Record. His name was John Krulla and he taught English at Intermediate School #33, of which the Appellant was principal. He is white (See: Testimony of Leroy Frederick at page 182 of Appendix). The teacher in Mr.Fredericks' testimony is referred to as Cruller.

[14]See: Plaintiff's Exhibit 34 in Record. See also: Testimony of Brother Lally at pages 710-712; 723-726 of Appendix.

Appellant Huntley. As such, the process was so morally and otherwise defective that it infringed upon both the Appellant's liberty[15] and property[16] interests in violation of his constitutional rights as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In this regard, this Court stated:

> ". . .The courts have become more inclined to consider the causes of discharge and the methods and procedures by which a dismissal is effected as it may bear upon reputation and the opportunity for employment thereafter." (Emphasis added).

Birnbaum v. Trussel, supra at page 677.

Accordingly and in view of the foregoing, the Appellant should have been entitled to a minumum of due process before being fired as he was.

D. THE APPELLANT WAS NOT ACCORDED DUE PROCESS AS SUCH HAS BEEN DEFINED BY THE FEDERAL JUDICIARY AND THE UNITED STATES SUPREME COURT

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[15] The liberty interest, of course, revolves around the stigmatization and ridicule which befell the Appellant as a consequence of the public display which he was subject to through the afore-described process.

[16] The property interest is statutorily created pursuant to the Civil Rights Act of 1871 (42 U.S.C. §1981), which was jurisdictionally pled (See: Complaint at pages 6-7 of Appendix) and which guarantees Black Americans the same rights in property and penalty, punishment and pain relative thereto as white American citizens, something which was clearly not accorded the Appellant.

In Williams v. Dade, 441 F.2d 299 (5th Cir. 1971), the Fifth Circuit held "that a meeting between a principal, a suspended student, and the student's parents, in which the principal merely explained to the parents the decision he had alredy reached, did not qualify as a 'hearing,' even though denominated as such by the principal [footnote omitted]."

At the very least, the employee should have an opportunity to challenge and refute the pervasive and conclusory charges against him through his own presentation of evidence to an impartial, neutral third party.

Needless to say, the procedures employed by the Community School Board at the community-wide public meeting on June 5, 1973, hardly provided the Appellant with an opportunity to refute the charges against him before an impartial third party and in an impartial atmosphere. In fact, he was totally unaware of the Appellee Superintendent's letter of June 1, 1974, until its contents were read publicly at the community-wide school board meeting on June 5, 1974. Aside from the humiliation he must have felt upon hearing the persuasive and unsupported conclusory statements of incompetence leveled at him and aside from the frustration he must have felt because of his inability to refute the same, his shock at hearing the charges was perhaps the most unfortunate aspect attendant to the denial of his due process rights.

Certainly, in every instance "the fundamental requisite of due process is the opportunity to be heard." Grannis v. Ordean 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). See also: Louisville and N.R. Co. v. Schmidt, 177 U.S. 230, 236, 20 S.Ct. 620, 44 L.Ed. 747, 750 (1900); Simon v. Craft, 182 U.S. 427, 436, 21 S.Ct. 836, 45 L.Ed. 1165, 1170 (1901); and Goldberg v. Kelly, supra at page 267.[17] Furthermore, the opportunity to be heard ". . .is an opportunity which must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). See also: Goldberg v. Kelly, Ibid.

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[17] See: Hunter v. City of Ann Arbor, 325 F.Supp. 847, 885 (E.D. Mich. 1971) where the Court stated:

> "The rationale of all these cases is that the Constitution protects a governmental employee from a patently arbitrary or discriminatory discharge, since it protects every citizen from harm caused by discriminatory or arbitrary governmental actions. The conclusion that a hearing is necessary in connection with a discharge is in actuality a conclusion that, unless such a procedure is afforded, no once will know whether the action taken by the government was discriminatory or arbitrary, and no protection will be given to the employee's right not to be so discharged. This reasoning goes to procedures, and does not attempt to define what reasons a government must have before it discharges an employee. It is not the job of a federal court to decide for a city whether an employee's retention is advisable, and once a procedure is followed that makes it clear that there was a factual basis for the action taken, and that it was not the result of constitutionally impermissible discrimination, the matter is at an end."

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In Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct., 624, 646, 95 L.Ed. 817 (1951), the Supreme Court enunciated a basic constitutional concept:

> "The right to be heard before being condemned to suffer grievous loss of any kind even though it may not involve the stigma and hardship of a criminal conviction is a principle basic to our society."

The necessity of comporting to basic due process requirement before the state acts, so as to take away a basic right, has been zealously guarded by the Court. See: Bell v. Burson, supra (Drive: 's license under Financial Responsibility Act cannot be taken away without the procedural due process required by the Fourteenth Amendment, including a prior hearing); Goldberg v. Kelly, supra;[18] Sniadach v. Family Finance Corp., supra, (Prejudgment replevin cannot be executed without invoking a procedure which requires notice and a prior hearing;[19] Ferguson v.

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[17] While the Hunter Court cited the District Court's decision in Roth, supra as one of the cases referred to as authority for the above-quoted proposition and while the District Court's decision was ultimately reversed in Roth, nevertheless the principle enunciated herein is still viable notwithstanding the Supreme Court's pronouncements in Roth; and is consistent, in fact, with the high court's decision in Roth.

[18] In Goldberg, the Court held that a prior hearing was necessary even though a subsequent hearing was afforded.

[19] In Sniadach, the Court held that a prior hearing was necessary even though a subsequent trial was accorded.

Thomas, supra (Before a college can terminate a professor who has an expectancy of reemployment, he or she must be accorded a meaningful opportunity to be heard in his own defense); Woodbury v. McKinnon, 447 F.2d 839 (5th Cir. 1971) (Hearing must be held prior to physician's removal from hospital medical staff).

There can be little doubt that the wrong done, herein, cannot be remedied by a subsequent hearing. Speaking to this point, the Supreme Court appropriately said in Fuentes v. Shevin, supra at page 571 that:

> "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if it was unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not. . .embraced the general proposition that a wrong may be done if it can be undone.' Stanley v. Illinois, ____U.S.____, ____, 31 L.Ed.2d 551, ____92 S.Ct. 1208."

In speaking to this very point, the Supreme Court said in Boddie v. Connecticut, 401 U.S. 371, 378-379, 91 S.Ct. 780, 28 L.Ed.2d 113, 119 (1971) that:

> ". . .the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirements that an individual be given an opportunity for a hearing before he is deprived of any

> significant property interest, except for extraordinary situ tions where some valid governmental interest is at stake that justifies postponing the hearing until after the event." (Emphasis included).

See also: Fuentes v. Shevin, supra at page 571, where the Court in reaffirming its previous pronouncements in this regard, stated:

> ". . .[T]he Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect." (Emphasis added).

E.g. Bell v. Burson, supra; Wisconsin v. Constantineau, supra, Goldberg v. Kelly, supra; Armstrong v. Manzo, supra; Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); Opp. Cotton Mills v. Administrator, 312 U.S. 126, 152-153 61 S.Ct. 524, 85 L.Ed. 624, 639, 640 (1941); United States v. Illinois Centl. R. Co., 291 U.S. 457, 463, 54 S.Ct. 471, 78 L.Ed. 909 (1934); Londoner v. City & County of Denver, 210 U.S. 373, 385-386, 28 S.Ct. 708, 53 L.Ed. 1103 (1908).

In Birnbaum v. Trussell, supra, this Court said:

> "Moreover, it is readily apparent that whatever injury appellant has suffered was a result of his being denied a hearing. (Footnote omitted). If appellant had been given an opportunity at a hearing prior to his removal to contest charges of anti-Negro bias, he might have been able to dispell the rumors and charges immediately, before his reputation suffered material damage. Furthermore, if they failed to do so he could have had no complaint under federal law about his dismissal. (Footnote omitted). Cf. Slochower v. Board of Higher Education, supra. In either case, a full hearing was the only way appellant's substantial inter-

> ests could have been protected, and Sec. 1983 affords him a right of action for injuries suffered in consequence of the denial of such a hearing." (Emphasis added).

So too, it is readily apparent that whatever injury the Appellant has suffered and is suffering was a result of his being denied a hearing. If the Appellant had been given an opportunity at a hearing prior to his termination, based on the persuasive and the unsubstantiated conclusory allegations of incompetence, he could have refuted the same with substantial evidence before his reputation suffered material damage. See: McNeill v. Butz, supra at pages 321-323, where the Court stated in this regard:

> "Procedural due process is a necessary concomitant of a democratic government's obligation to practice fairness. Joint Anti-Fascist Refugee Commitee, 341 U.S. at 170, 71 S.Ct. 624 (Frankfurter, J., concurring); Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). However, the requirements of procedural due process may flexibly be adapted to the demands of particular contexts. Joint Anti-Fascist Refugee Commitee, 341 U.S. at 162-163, 71 S.Ct. 624; Morrissey v. Brewer, 408 U.S. at 481, 92 S.Ct. 2598. '[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' Cafeteria Workers, 367 U.S. at 895, 81 S.Ct. at 1748. Goldberg v. Kelly, 397 U.S. at 263, 90 S.Ct. 1011.

In various civil settings, the Supreme Court has stressed the critical nature of the right to confront and cross-examine adverse witnesses. In Goldberg v. Kelly supra, the Court held that due process requires a state to permit a welfare recipient to confront and cross-examine adverse witnesses before it can terminate his welfare benefits. Id., at 267-268, 269, 90 S.Ct. 1011. The Court outlined the rudiments of due process, emphasizing the crucial function of confrontation. 'In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.' Id., at 269, 90 S.Ct. at 1021. Goldberg quoted at length from Greene v. McElroy, 360 U.S. 474, 495-497, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), a case which held that cross-examination was required before a security clearance was revoked and the employee discharged:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be prejurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. . . . This Court has been zealous to protect these rights from erosion. It has spoken out. . .in all types of cases where administrative. . .actions were under scrutiny.

The Court reaffirmed these principles in Morrissey v. Brewer, supra, which defined the scope of due process for parole revocations.

The government must first hold a preliminary hearing soon after the parolee is taken into custody, and then hold a final revocation hearing within a reasonable period. At both hearings, the minimal requirements of due process mandate that the parolee have an opportunity to confront and cross-examine adverse witnesses 'unless the hearing officer specifically finds good cause for not allowing confrontation.' Id., at 489, 92 S.Ct. at 2604. Thus, Goldberg and Morrissey, the Court's most recent major elaborations of the minimum requirements of procedural due process, both signal the importance of confrontation where factual allegations are in dispute.

In Caulder v. Durham Housing Authority, 433 F.2d 998 (4 Cir. 1970), cert. denied 401 U.S. 1003, 91 S.Ct. 1228, 28 L.Ed.2d 539 (1971), we held that procedural due process required a public housing project to grant at least an informal hearing before it could evict a tenant. We further held that the hearing must include 'an opportunity on the part of the tenant to confront and cross-examine adverse witnesses.' 433 F.2d at 1004. See Escalera v. New York City Housing Authority, 425 F.2d 853 (2 Cir.) cert. denied 400 U.S. 853, 91 S.Ct. 54, 27 L.Ed. 2d 91 (1970).

In applying these governing principles to the circumstances before us, we conclude that the relative natures of the government function and the private interest do not permit the government to discharge these employees without providing notice and a hearing at which the employees can confront and cross-examine the government's informers. In both cases, the propriety of dismissal hinged strictly on factual determination, and the evidence consisted primarily of individual testimony. Thus, these dismissals arise in a context where confrontation and cross-examination are paradigmatically useful in discovering the truth. See Snead, supra, 355 F.Supp. at 772.

> We do not dispute that the government has a substantial interest in the efficient and orderly discharge of unsatisfactory employees. But this interest does not out weigh the employee's interest in having an effective opportunity to challenge damning evidence and in perserving his job and reputation. As was said in Stanley v. Illinois, 405 U.S. 645, 656, 92 S.Ct. 1208, 1215, 31 L.Ed.2d 551 (1972):
>
> > The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. In deed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency which may characterize praiseworthy government officials.
>
> See Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). Cr. Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971)." (Footnote omitted).

While the Appellant might not be entitled to elaborate due process protections, such as the right to counsel and the right to present witnesses and cross-examine his accusers, he submits that, at the very least, he is entitled to the same safeguards that the very students who he was responsible for are entitled to pursuant to the Supreme Court's decision in Goss v. Lopez, ____U.S., ____S.Ct.____, 42 L.Ed.2d 725 (1975). In that regard, the Supreme Court held that:

"It also appears from our cases that the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved. Cafeteria Workers v. McElroy, supra, at 895, 6 L.Ed.2d 1230; Morrissey v. Brewer, supra, at 481, 33 L.Ed.2d 484. The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

* * *

We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency. Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school. [Footnote omitted]."

Id. at 42 L.Ed.2d 737-739.

As in Goss, supra, the rudimentary due process which Appellant submits he is entitled to is something which any fair minded Community Board would impose upon itself in order to avoid an unfair termination, with the severe consequences attendant thereto, of one of its employees, Black or white.

It is particularly true in the instant case where an ostensibly progressive and fair minded school board allegedly sought to break down institutionalized discriminatory barriers against minority persons such as the Appellant, through "affirmative action"; but went out of its way to railroad the very person through an incredibly unfair process in firing him. The latter is facially inconsistent with the former and manifests a realization that human beings really do not understand the dimensions of institutionalized racism and the extents to which they must go in order to eradicate, as much as humanly possible, all vestages of that discrimination (See: Discussion, infra). Where, as here, those human beings do not go that extra degree and, in fact, do not even bother to tell their victim that they are about to pronounce him an incompetent and failure, as they stigmatized the Appellant herein, the law must require them to do so and allow that "public servant" the right to at least discuss the charges and give his side of the story.

Accordingly, this Court must hold that the Appellees, under the circumstances and in view of their methods, violated the Appellant's constitutionally guaranteed due process rights by denying him any semblance of due process prior to firing him from his position as principal of Intermediate School #33 in Brooklyn, New York Community School District #14.

II. THE APPELLANT'S TERMINATION FROM HIS POSITION AS PRINCIPAL OF INTERMEDIATE SCHOOL #33 IN BROOKLYN, NEW YORK COMMUNITY SCHOOL DISTRICT #21 WAS ARBITRARY, CAPRICIOUS AND RACIALLY DISCRIMINATORY AND, ACCORDINGLY, IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CIVIL RIGHTS ACT OF 1866 (42 U.S.C. §1981).

In July, 1970, the Appellant was hired to fill the position of principal of Intermediate School #33 in Brooklyn, New York School District #14.[20] Said School has a student body population which is approximately 99% minority (Black and Hispanic) and 1% "other" (white) while said School District has a student body population which is approximately 90% minority (Black and Hispanic) and 10% "other" (white). See: Testimony of Claude L. Huntley, Jr. at pages 184-185 of Appendix. See also: Appendix at pages 831-833.

The Community School Board of Brooklyn, New York School District #14 is composed of nine members of whom six are "others" (white) and three are minority (one Black and two Hispanic). See: Testimony at page 329 of Appendix.

In his position as principal of Intermediate School #33 in District #14, the Appellant was the first Black person to hold such a position in any public school in District #14. The

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[20]The evidence established that the Appellant was initially hired as a consequence of community pressure to have a Black principal appointed to fill the recently created vacancy and the Board's acquiescence in this desire. However, the evidence shows as well that, notwithstanding that the Community Board did accede to the community pressure and did, in fact, pursue its decision to retain the Appellant once he was hired and that action was challenged, he never had the support of the Community School Board, save for that of the minority members.

Appellant performed his duties in his capacity as principal of Intermediate School #33 in Brooklyn, New York School District #14 satisfactorily and competently effective the date of his appointment in July, 1970, until June 5, 1973 when he was summarily terminated from his position by the Community School Board of Brooklyn, New York School District.

At present, twenty years after Brown v. Bd. of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) and almost two full years after the Second Circuit's decision in Chance, supra, there are virtually no minority persons employed as principals[21] of public schools in Brooklyn, New York Community School District #14 and no Black persons whatsoever in district-wide policy making positions.

In Chance v. Board of Examiners and Board of Education of the City of New York, 330 F.Supp. 203 (S.D.N.Y. 1971), Affirmed 458 F.2d 1167 (2nd Cir. 1972), the District Court granted a preliminary injunction based on the "sufficient showing" which was made of a "violation of the Equal Protection Clause of the Fourteenth Amendment." 330 F.Supp. at page 205.

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[21] It is true that there has been an increase in the number of assistant principals of Hispanic background in the District since Mr. Huntley was hired in 1970 and even since he was terminated. However, the number of Black supervisory positions have not increased; and it is in that context which this case must be considered. Furthermore, the increase in the number of Hispanic supervisors must be tempered by the fact that they are still few in number in relationship to the total number of supervisory personnel in the District and particularly in view of the overwhelmingly minority composition of the schools in said District. Moreover, the position of assistant principal is not, in fact, the same as the position of principal around which this litigation is focused; and there is a wide difference in the status of an assistant principal and that of a principal.

In describing the Plaintiffs' cause of action before the District Court in Chance, supra, Circuit Judge Feinberg wrote:

> "Plaintiffs claimed that competitive examinations given by the Board to those seeking permanent appointment to supervisory positions in the City's schools discriminated against blacks and Puerto Ricans and violated the Equal Protection Clause of the Fourteenth Amendment [Footnote omitted]." 458 F.2d 1169.

In affirming the District Court's preliminary Order, Judge Feinberg noted that:

> "All that the court below did was to enjoin, on an interim basis, examinations that it justifiably found to have a discriminatory effect and to be ill-suited for their purpose and to fill vacancies on an acting basis with candidates meeting criteria satisfactory to them. That order was not improper and we affirm it." 458 F.2d 1179.

In discussing the District Court's findings of fact, Circuit Judge Feinberg summarized the same, stating at pages 1171-1172 that:

> "The record shows that the trial judge in the early stages of the case was skeptical of plaintiffs' ability to prove their claims, and thereafter proceeded cautiously, thoroughly and fairly before making any findings of fact. It is against that background that defendant's attack on his factual findings must be considered.
>
> The district judge read the Survey to show that white candidates passed the various supervisory examinations, considered together, 'at almost 1½ times the rate of Black and Puerto Rican candidates.' 330 F.Supp. at 210. The court, however, found even more significant the fact that:

> [W]hite candidates passed the examination for Assistant Principal of Junior High School at almost double the rate of Black and Puerto Rican candidates, and passed the examination for Assistant Principal of Day Elementary School at a rate one-third greater than Black and Puerto Rican candidates.

Id. The statistics for the latter two examinations were thought particularly significant 'because they were taken by far more candidates than those taking any other examinations conducted in at least the last seven years,' and 'because the assistant principalship has traditionally been the route to and prerequisite for the most important supervisory position, Principal.' Id. The judge reasoned that these examinations for assistant principal screened minority applicants out of a chance to become full principals, thus in effect magnifying the overall statistical differences between white and non-white pass-fail rates. 330 F.Supp. at 210-211. [Footnote omitted]. The court also relied on other statistics, which showed that cities not using New York's system of examinations had a startlingly higher percentage of blacks and Puerto Ricans in supervisory positions:

City	Total No. of Principals	% Black	% Puerto Rican	% Black & Puerto Rican
Detroit	281	16.7%	-----	16.7%
Philadelphia	267	16.7%	-----	16.7%
Los Angeles	1,012	8.0%	1.7%	9.7%
Chicago	479	6.9%	-----	6.9%
New York	862	1.3%	0.1%	1.4%

City	Total No. of Asst. Principals	% Black	% Puerto Rican	% Black & Puerto Rican
Detroit	360	24.7%	0.2%	24.9%
Philadelphia	225	37.0%	----	37.0%
Los Angeles	---	-----	----	-----
Chicago	714	32.5%	----	32.5%
New York	1,610	7.0%	0.2%	7.2%

> 330 F.Supp. at 213. Thus, the percentages of New York City Black and Puerto Rican principals and assistant principals (1.4% and 7.2%) were found to be substantially below those percentages for other large city school systems. The percentage of Black and Puerto Rican principals in Detroit and Philadelphia (16.7%), for example, was 12 times higher than that in New York (1.4%)."

In rejecting the Board of Examiners' positions that the District Court was mistaken in drawing the inference which it did from the aforementioned factual and statistical information, Judge Feinberg concluded:

> "The last argument points up the crucial nature of the fact finding process in a case like this. After all the technical statistical jargon like 'one tail' or 'two tail' tests and 'Chi-Square Test (Yates-corrected)' as well as the less esoteric numbers and percentages were placed before the trial judge, it was his job to resolve the issues. Throughout the briefs of the Board and its supports runs the argument that other reasons can be inferred from the record for the comparatively low numbers of blacks and Puerto Ricans in supervisory positions. That may very well be true. But the question before us is whether the trial judge on the record before him was required to accept those inferences, and it is quite clear that he was not. In sum, while not all of us might have made the same factual inferences of racially discriminatory effect from the statistical evidence, both documentary and oral, before the court, none of us can say with the firm conviction required that those factual findings were mistaken. See United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 788, 92 L.Ed. 1147 (1948)."

Id. at page 1173.

Finally, this Court affirmed the District Court's findings and ruling that the Board of Examiners had failed to meet its burden in estab lishing that, in fact, the tests which it prepared and administered were "job-related." In other words, this Court affirmed the District Court's findings that, as a matter of fact, the "examinations prepared and administered by the Board significantly and substantially discriminated against Black and Puerto Rican applicants" Ibid; and that the examinations had not been validated and were not shown to be job related. Id. at page 1174.

Then turning to the correctness of the legal conclusions drawn by the District Court in view of the findings of fact, Judge Feinberg held:

> "We believe that on this and other evidence in the record the district court properly conclude that plaintiffs had demonstrated a disparity of sufficient magnitude to amount to a prima facie case of invidious de facto discrimination."

Id. at page 1176.

In short, then, the focus of the Appellant's cause herein must be considered in the context of the recently and judicially acknowledged[22] discriminatory practices of the New York City

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[22]Apparently such was acknowledged as well by the New York City Board of Education and the Chancellor. See: Judge Feinberg at page 1169 where he stated in this regard:

> "The appeal comes to us in an unusual posture. Since plaintiffs attacked the method used to fill supervisory positions in the

(cont'd on next page)

Public School System insofar as such relate to the hiring of minority persons into supervisory and administrative positions within the school system structure and in view of the fact that there is a dearth of such persons in those positions, both when considering the matter in a city-wide context and, more specifically, in the context of Brooklyn, New York Community School District #14.

In an effort to halt the further decimation of the ranks of Black educators as a result of accompanying school desegregation, the federal courts have imposed upon school officials the burden of establishing that Black educators displaced in such cases, have been "judged by definite objective standards with all of the teachers in the system for continued employ-

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22 school system of the City of New York, one would surmise that their primary opposition would come from those in charge of that system, the Board of Education of the City of New York and its Chancellor, Harvey B. Scribner, [footnote omitted] both named as defendants in this action. However, although the Board of Education appeared below, it did not actively oppose the motion for a preliminary injunction and has not appealed from the district court's order. The Chancellor has done even less. In a memorandum to the Board of Education, quoted by Judge Mansfield in his opinion, Mr. Scribner stated that to defend against plaintiffs' case

> 'would require that I both violate my own professional beliefs and defend a system of personnel selection and promotion which I no longer believe to be workable.'

330F.Supp. at 219-220."

ment. . ." Wall v. Stanly County Board of Education, 378 F.2d 275, 276 (4th Cir. 1967). See also: Walton v. Nashville, Ark. Special School District No. 1, 401 F.2d 137, 144 (8th Cir. 1968) wherein the Court stated at page 144:

> "They have every right to demand and to be shown that race is not the criterion by which employment is granted or denied." (Emphasis added).

In accord: Haney v. County Board of Ecucation of Sevier County, 429 F.2d 364, 371 (8th Cir. 1970); North Carolina Teachers Association v. Asheboro City Bd. of Education, 395 F.2d 736 (4th Cir. 1968); Rolfe v. County Board of Ecucation of Lincoln County, Tennessee, 391 F.2d 77, 80 (6th Cir. 1968); Buckley v. Coyle Public School System, 476 F.2d 92, 97 (10th Cir. 1973).

In Haney v. County Board of Education of Sevier County, supra at page 371, the Eighth Circuit Court of Appeals stated:

> "We are not saying that all teachers have to be retained in the school system, but only that an objective non-discriminatory standard must be set up and utilized for the evaluation and retention of the teachers needed for the operation of the school system." (Emphasis added).

Any ambiguity in the decisions of the Eighth Circuit as to whether the standards for evaluating teachers must be objective was laid to rest in Moore v. Board of Education of Chidester School District No. 59, 448 F.2d 709 (8th Cir. 1971) wherein the Court stated at page 713 that:

> ". . .[W]e now make clear that a board of education is obligated to use objective non-discriminatory standards in the employment, assignment, and dismissal of teachers." (Emphasis added).

Continuing, the Court stated:

> "Furthermore, subjective standards carry little weight in meeting the board's burden to prove clearly and convincingly that it is not discriminating where there has been a history of racial segregation since Brown I. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)." (Emphasis added). Ibid.

See also: United States v. Cotton Plant School District No. 1, 479 F.2d 671, 672 (8th Cir. 1973). Moreover, in Smith v. Board of Education of Morrilton School District No. 32, 365 F.2d 770, 782 (8th Cir. 1966) the same Eighth Circuit stated:

> ". . .[I]n this day race per se is an impermissable criterion for judging either an applicant's qualifications or the district's needs. And this applies equally to considerations described as environment or ability to communicate or speech patterns or capacity to establish rapport with pupils when these descriptions amount only to euphemistic references to actual or assumed racial distinctions."

In discussing the degree to which a school board must establish objectivity once the burden of proof has shifted, the Court stated in Chambers v. Hendersonville City Board of Education, 354 F.2d 189, 192 (4th Cir. 1966):

> "In this background, the sudden disproportionate decimation in the ranks of the Negro teachers did raise an inference of discrimination which thrust upon the School Board the burden of justifying its conduct by clear and convincing evidence." (Emphasis added).

See also: North Carolina Teachers Association v. Asheboro City Board of Education, supra at page 743, footnote eleven, wherein the Court stated

> "We reaffirm our holding in Chambers that a long history of racial discrimination, coupled with sudden disproportionate decimation in the ranks of Negro teachers when desegregation is finally begun, gives rise to an imputation of racial discrimination in the failure to rehire Negro teachers. Such circumstances, we repeat, cast the burden of proof on the school authorities to show that the failure to rehire was for non-discriminatory reasons, and require that the proof be clear and convincing before the failure to rehire will be up held." (Emphasis added).

Baker v. Columbus Municipal Separate School District, 329 F.Supp. 706, 720 (N.D. Miss. 1971), Affirmed 462 F.2d 1112 (5th Cir. 1972), wherein the Court stated:

> "The inference of racial discrimination arising from the circumstances of this case 'thrust[s] upon the School Board the burden of justifying its conduct by clear and convincing evidence.' Chambers v. Hendersonville City Bd. of Educ., supra, 364 F.2d at 192; Smith v. Concordia Parish School Board, Civ. No. 11, 577, (W.D. La. Sept. 3, 1970), p. 9, appeal pending No. 30, 556; Rolfe v. County Board of Education of Lincoln County Tenn., 391 F.2d 77, 80 (6th Cir. 1968)." (Emphasis added).

In accord: Armstead v. Starkville Municipal Separate School District, 325 F.Supp. 560, 570 (N.D. Miss. 1971), Modified in part 461 F.2d 276 (5th Cir. 1972); Williams v. Kimbrough, 295 F.Supp. 578, 585 (W.D. Louisiana 1969); and Moore v. Chidester, supra at page 711 where the Court stated:

> "A school district must show by 'clear and convincing' proof that the dismissal of black teachers was not unlawfully discriminatory if the district. . ." (Emphasis added).[23]

In determining whether or not a school district satisfies its burden, in this regard, a Court must carefully weigh the evidence so that the sophistication of the mode of racial discrimination is not masked by what appears to be legitimate considerations and criteria. It goes without saying that a school district and its officials would not admit that race was a factor in their consideration of the employment status of particular personnel. Appellant submits, however, that something more than a mere pronouncement of objectivity must be established in order for a school board to meet its burden by "clear and convincing evidence." Addressing himself to this very point, Judge Sobeloff stated in North Carolina Teachers Association v. Asheboro City Board of Education, supra at page 750:

> ". . .[I]t must be insisted that bland assertions by the School Board that its decisions were free of racial considerations do not suffice to discharge its burden. . . ." (Emphasis added).

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[23] See: Alexander v. Warren, Arkansas School District No. 1 Board, 464 F.2d 471, 474 (8th Cir. 1972) where the Court, in addressing itself to the definition of "clear and convincing," stated:

> "Certainly, 'clear and convincing' demands more than just a 'preponderance of the evidence.'"

It is true that the circumstances herein are different in certain respects than the circumstances in the aforementioned cases. In those cases a long history of segregation existed within the entire public school structure prior to the dismissal of the Black administrators and/or teachers; the dismissal of those teachers and/or administrators usually accompanied the first year of court ordered desegregation of the public school structure; and the dismissals usually affected a disproportionate number of Black administrators and/or teachers.

The Appellees would contend, therefore, the principles enunciated in those cases, particularly as they relate the burden of proof (its shifting nature and the weight of evidence required of the parties), are inapplicable herein.

While there is no evidence herein that the public schools in District #14 have been segregated in the traditional 'de jure" fashion of the "old south", there can be little question that, in fact, District #14 is a virtually all minority (Black and Hispanic) District; and that within the larger New York City Public School it is a segregated school entity created by the acts of state officials. Viewed as such and when considered in the context of Hart v. Community School Board #21, ____F.2d ____, (2nd Cir. 1975), Affirming 383 F.Supp. 699 (E.D.N.Y. 1974); Branche v. Board of Education of Town of Hempstead, 204 F.Supp. 150, 153 (E.D.N.Y. 1962); and Blocker v. Board of Education of Manhasset, New York, 226 F.Supp. 208, 229 (E.D.N.Y. 1964), the cause here can be reasonably considered in the context of a segregated public school structure.

More importantly, this case must be considered in the context of the acknowledged racially discriminatory hiring practices discussed in Chance, supra which have resulted, until just recently, in an overwhelmingly white administrative and teaching public school structure.

Accordingly, termination must be considered not so much in the context of what has happened in the last several years (for instance since 1970 when Mr. Huntley was hired among other reasons, because of the fact that District #14 had no minority persons in administrative positions; or since 1972 when Chance, supra was decided) but rather what existed prior to the recent efforts of school officials to rectify the effects of their discriminatory actions of the past.

The focus, therefore, is not so much on the fact that there may be three minority persons who are principals in District #14 at this time and that there was only one at the time the Appellant was hired (himself) but rather on the fact that, when the Appellant was fired, there was a racially discriminatory effect infused into the ostensibly well motivated affirmative actions efforts of the primarily white District #14 officials.

If considered in relationship to the number of minority principals in District #14, the Appellant's termination was disparate on minority persons, particularly when viewed in the context of the student body composition of District #14 schools which is overwhelmingly minority (as compared to the faculty and administrative structure which is overwhelmingly white).

Finally, this case must be viewed in the context of the apparently unequal treatment which the Appellant received when compared to the recent treatment which two of his white counterparts received.[24]

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[24] In that regard, white supervisory personnel who were rated unsatisfactory in their job performance and/or otherwise subject to some sort of negative evaluation were given the option to resign and/or to transfer into another position within the District. See: Testimony of Leroy Fredericks at 345-349 of Appendix. The Appellees argue that those persons were tenured and were entitled to the same while the Appellant herein was not in like circumstance. Appellant submits that such argument is tenuous, particularly in view of the treatment which was accorded to a white probationary employee (teacher) who was, in fact, under the supervision of the Appellant. See: Discussion, supra at pages 35-37 of this Brief. Moreover, the tenure argument is a questionable justification for differential treatment in this respect. Appellant submits that, in the context of his hiring because he is a Black man and in view of the history of racial discrimination in the New York City School District which has foreclosed Black persons from supervisory positions within the school system, his interest is as great, if not greater, than the interest which his white counterpart has in tenure; and that, accordingly, he should have been tendered the same options as his white counterparts, with tenure, notwithstanding his absence of tenure, See: Discussion of the "property interest" which Appellant contends he has, in this regard, under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In that regard, the days of the infamous "Bull Connor" are gone; and accordingly the devices, intentional and otherwise, which perpetuate racial discrimination in our institutions are not as easily recognized.[25]

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[25]In that regard, the Appellant presented evidence which established that the "chaos" alleged to have existed at I.S. #33 was not substantially greater than the "chaos" which existed at other schools and which had existed at I.S. #33 previously. The Appellees rely on some evidence relating to a series of fires at I.S. #33 to justify their actions; and the Appellant presented evidence which established that, but for a short period of time during the last school year when he was principal, the fire situation was not out of hand as is alleged. As a matter of fact, during the last several months he was on the job, there were virtually no fires at the school; and such can be attributable as much to the action taken by the Appellant in assigning students to monitor the halls and the fire boxes within the school as to anything else. See: Testimony at pages 193-196 of Appendix. See also: Documents at pages 842-880 of Appendix. Evidence establishes that, if teachers were doing as they were directed to do by the Appellant, fires, which were ostensibly started by students, would not have occurred. Furthermore, the evidence establishes that the Appellee Superintendent herein made no independent evaluation of Mr. Huntley but rather listened to the grievances of a certain group of teachers in the school who were in conflict with certain of the Appellant's positions and philosophies; and that he did not seek to obtain the equally strong sentiment from teachers and other persons at the school who felt that the Appellant was capable and efficient. In fact, one witness for the Appellant, who is a guidance counselor in the New York City School District and who has been employed in that capacity for approximately twenty-seven years, submits that the Appellant was the finest principal she ever worked under in the performance of her duties (See: Testimony of Elizabeth Karpf at pages 282-284 of Appendix).

The evidence established that the Appellee Superintendent condoned and encouraged the practice of personnel, under the authority of Mr. Huntley, coming to him (the Superintendent) directly (and often times in secret) to discuss grievances which they had with Mr. Huntley rather than directing those individuals to take their grievances up with the Appellant, at

(cont'd on next page)

This Court must be mindful of the same in analyzing this case, lest it be blinded to the "sophisticated. . .modes of discrimination," Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939) and become a part of the "explicit and implicit conspiracy of an entire society and its local, state and federal governmental arms" which "impose social, political and economic segregation that has in large measure created the racial dilemmas our Country now faces." Hart v. Community School Board of Brooklyn, New York School District #21, 383 F.Supp. 699, 743-744 (E.D.N.Y. 1974), Affirmed ____F.2d____ (2nd Cir. 1975).

Appellant submits that, after he has carried his burden of proof and established a prima facie case, the Court must then be satisfied by the Appellees that they employed objective criteria in evaluating the Appellant prior to his termination and that the criteria so employed bear a "manifest relationship to the employment in question." See: Griggs v. Duke Power Co., 401 U.S. 424, 431-432, 91 S.Ct. 849, 853-854, 28 L.Ed.2d 158 (1971), cited with approval and as authority in United States v. Chesterfield County School District, S.C., 484 F.2d 70, 73 (4th Cir. 1973) where Circuit Judge Winter stated for the Court:

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[25] least initially, before coming to him. Furthermore, the evidence shows that when Mr. Huntley would send personnel to the District office for discipline and sanction as a consequence of what he perceived to be lack of performance, the Appellee Superintendent often failed to do anything about the situation; and otherwise acted, administratively, to under-cut the authority of the Appellant and to subvert his ability to function as the principal of the school.

"A second principle to be reckoned with is the holding in Griggs v. Duke Power Co., 401 U.S. 424, 431-432, 91 S.Ct. 849, 853-854, 28 L.Ed.2d 158 (1971), that

> If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.
>
> * * *
>
> Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

We follow this holding Robinson v. Lorillard Corporation, 444 F.2d 791, 798 (4 Cir.), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971), and Moody v. Albemarle Paper Company, 474 F.2d 134, 138 (4 Cir. 1973). Griggs, Robinson and Moody dealt with initial employment and promotion, but the principle of those cases is equally applicable to the discharge of employees or the failure to reemploy. Of course, Griggs, Robinson and Moody were decided under Title VII of the Civil Rights Act of 1964 and the instant case arises under the Fourteenth Amendment. But it has been held, and we think correctly, that the test of validity under Title VII is not different from the test of validity under the Fourteenth Amendment. Castro v. Beecher, 459 F.2d 725, 732-733 (1 Cir. 1972); Western Addition Community v. Alioto, 340 F.Supp. 1351, 1353-1354 (N.D. Cal. 1972); Davis v. Washington, 352 F.Supp. 187, 191 (D.D.C. 1972); Shield Club v. City of Cleveland, 5 FEP cases 566, 567 (N.D. Ohio 1973). See also Baker v. Columbus Municipal Separate School District, 462 F.2d 1112, 1114 (5 Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167, 1176 (2 Cir. 1972) [footnote omitted]." (Emphasis added).

Appellant submits that no objective criteria or procedures were established to ascertain whether he was performing his job adequately; and the conclusion that he was not was a conclusion

subjectively arrived at by the Superintendent. For each witness that thought the Appellant was not performing his duties adequately, there was at least one person, either professional or lay, who felt that the Appellant was doing an outstanding job as principal. The only possibly objective criteria presently being utilized reflect that the number of fires and untoward incidences at the School were on a decrease; and that, in fact, for the two months prior to the Appellant's termination there were no fires whatsoever.[26]

On the other hand, if this Court should find that, in fact, the Appellant was failing in the performance of his duties a principal of Intermediate School #33, based on objective criteria, something which the Appellant submits cannot be found since the Appellees' witnesses all testified that there were no written criteria or procedures for evaluating the Appellant and since, based on fires and untoward incidences (two objectively based criteria), the Appellant was, at the time of his firing, improving substantially in this regard, nevertheless this Court must find that, as a matter of fact, the Appellant was not given the supportive services and training which were necessary to assist him in performing his duties, supportive services and training which he would have otherwise received if he was white and which white personnel in similar positions did receive. See: Testimony of Claude L. Huntley at pages 189; 200-204 of Appendix. See also: Testimony of Ralph Brande at pages 604-607; 612 of Appendix; Testimony of William Rogers at pages 547-548 of Appendix.

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[26]See: Appendix at pages 839; 842-880.

Accordingly, the natural and foreseeable consequence of placing the Appellant in that situation was to subvert his efforts and assure his failure. Therefore, as a matter of fact and law, his termination, just as his initial hiring, must be considered primarily racial in basis. Being such, it is illegal and unconstitutional; and this Court must so hold. See: Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974), Modifying 352 F.Supp. 135 (E.D. Mich. 1972)

In Long, a Black man brought a suit against Ford Motor Company charging that his termination from a supervisory position was racially discriminatory. The District Judge held that the Plaintiff was a capable individual who was shifted from job to job and who was not given adequate training for his final job as a wage analyst; and that, accordingly, his termination was illegal because race was a factor therein. He stated in this regard:

> "Lower and middle-management personnel still possess a great lack of awareness of the problems of racial discrimination and the right to equal employment opportunity. This lack was demonstrated during the trial by the testimony of virtually all those Ford employees (both black and white) that they were, in effect, 'color blind.'
>
> This testimony indicates that they did not understand what Mr. Ford had said to them. People who say that they are color blind and stop there either do not understand or do not care to understand the problem of racial discrimination. Ford did not tell his management group to be 'color blind'; he told them to be 'color conscious.' And he said much more. He said that that consciousness should carry with it the equally important goal of thorough job training. This testimony indicates that these management

people -- contrary to the position of their higher management -- have little awareness of the need for positive steps to advance black people into the lower and middle-management levels. They seem willing, even, to accept token integration of these levels of management so long as this does not require changes in entrenched attitudes and practices.

What must be understood in an analysis of this case is that a black man should not be hired just because he is black. A black person who is hired solely for appearance sake and is inexperienced and not given thorough job training is likely to fail. If that occurs and he is then fired, one may conclude that just as he was hired because he was black, so he was fired because he was black.

This community has seen black men, some with college degrees, placed into management positions in which they had no experience and for which they received little or no training. As a result there were resignations or firings and the common black man's complaint is then that this occurred because of race.

It is against his background that the facts of this case must be judged." (Emphasis included).

Long v. Ford Motor Company, 352 F.Supp. at pages 136-137.

Continuing, Judge Feiken stated at page 141 that:

"It must be recognized that an inadequate job performance alone cannot justify what is otherwise a discriminatory termination. While Ford's policy (as expressed above in Exhibit 4) is admirable in its apparent desire to hire members of minority groups, the responsibility does not end there. Once hired, black people and other traditionally disadvantaged minorities must be given the job training necessary to enable them to perform their jobs.

As Mr. Ford recognizes and as the court notes, many minority groups have historically been discriminated against in many ways. To put a

> black person in a position for which he has been inadequately trained is not a way to eliminate racial discrimination, but rather an un-thinking way to perpetuate it.
>
> Thus, since race was a factor, Long's termination was impermissible. See Pughsley v. 3750 Lake Shore Drive Cooperative Building Co., 463 F.2d 1055 (7 Cir., 1972); Williamson v. Hampton Management Co., 339 F. Supp. 1146 (N.D. Ill. 1972)." (Emphasis included).

In modifying and remanding, the Court of Appeals did not disagree with the District Court's legal analysis, in its entirety; rather, it clarified Judge Feiken's analysis and remanded to the District Court for a further evidentiary hearing on the absence of training and/or a comparative analysis of the type of training which white persons received relative to the type of training which Black persons received. Judge Celebrezze, writing for the Court, stated:

> "Thus, it was error for the District Court to hold Appellant liable for a failure to train Appellee adequately, absent a showing that this failure constituted either dissimilar treatment from the training whites receive or treatment similar on its face but dissimilar in its effects upon racial minorities and unfounded on business necessity. See Griggs v. Duke Power Co., supra; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Robinson v. Lorillard, 444 F.2d 791 (4th Cir. 1971).
>
> Although the District Court made various observations and findings of fact, we cannot perceive an alternative holding sufficient in detail under Rule 52(a), Fed. Rules Civ. Proc., to permit review. Rather than specify that Appellee had received dissimilar treatment, the District Court relied on a rationale of inadequate training

per se. Thus, we must remand for further proceedings to determine whether Appellee should recover on a proper ground.

The parties and the District Court did not have the benefit of McDonnell Douglas' reasonining in the proceedings below. On remand, the District Court should apply McDonnell Douglas' principles on the order and allocation of proof. A person alleging a §1981 violation must first establish that his employment terms vary from those which his employer accords to similarly situated white workers.

This can be shown by proof either that intentional racial prejudice entered into his treatment or that a facially neutral practice (here Appellant's performance evaluation system) operates discriminatorily against minority employees. In this case, Appellee may be able to establish that he was trained inadequately whereas white co-employees were trained adequately. He may be able to establish that Ford's promotion system, which relies heavily upon the subjective evaluation of supervisors, has a discriminatory impact on minority employees, so that its use in discharging him was improper. Appellee may be able to establish that similarly situated white employees with comparable records would have been offered different positions within Ford rather than discharged, whereas he was forced to leave Ford altogether. We express no opinion as to whether the record below would support any of these possible holdings.

If Appellee establishes a prima facie case of dissimilar treatment due in part to racial discrimination, Appellant must then establish 'some legitimate, nondiscriminatory reason for the employee's rejection.' McDonnell Douglas Corp. v. Green, 411 U.S. at 802. In this case Appellant would argue that Appellee's unsatisfactory performance review justified this termination and that his system of evaluation is grounded on business necessity.

> If Appellee has established a prima facie case but Appellant's rebuttal is sufficient to overcome Appellee's initial showing, Appellee must then prove that his discharge was nonetheless a violation of Section 1981 because Appellant's stated reason for the discharge was merely a pretext for a termination actually based on racial prejudice. 411 U.S. at 804. If the proofs reach this point, the District Court will have the task of evaluating the objectivity, sincerity, and honesty of the witnesses to arrive at a necessarily subjective conclusion.
>
> Because of the new light shed on employment discrimination cases by McDonnell Douglas, we remand this case for such further proceedings as the District Court deems necessary to arrive at a just and proper conclusion. Affirmed in part and reversed in part for further proceedings in conformance with the principles enunciated herein. [Footnotes omitted]." (Emphasis included).

Long v. Ford Motor Company, 496 F.2d at pages 505-506. See also: McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Appellant herein submits that an analysis of the evidence established that, if he was performing his duties unsatisfactorily (which, as previously discussed, he does not believe the evidence will establish), it was as a consequence of receiving less supportive services than his white counterparts; and, that accordingly, his evaluation and termination are tinted with racial overtones and inequality. See: Testimony at pages 189; 200-204 of Appendix.

In view of the same, the Appellees must establish, clearly and convincingly, that the lack of equality of supportive services and training was not the cause for the negative evaluation and ultimate termination of the Appellant.

Appellant submits that the Appellees did not establish the same; and that, accordingly, this Court must declare his termination to be racially discriminatory and unconstitutional.

It might be fairly argued that, under the present state of the law, a non-tenured school teacher or school administrator can be fired for completely arbitrary reasons so long as those reasons do not invade a constitutionally protected area; and furthermore, that the process by which he is terminated can be completely arbitrary, as well.

Appellant submits, however, that because he is a Black person and because that factor was a dominant consideration in his hiring due to the acknowledged discrimination against Black persons by the New York City School District relative to supervisory positions therein, he cannot be fired for arbitrary reasons pursuant to an arbitrary process; and that, where the evidence establishes that the reasons for his termination were arbitrary, those reasons then assume a racial dimension and cross over into a constitutionally protected area.

In a slightly different context, the cases cited herein establish the acceptance and adherence to this position by the federal judiciary. In the instant case, under admittedly

slightly different factual circumstances than those revolving around southern school desegregation matters, this Court must necessarily come to the same conclusion. Otherwise, the Black person has absolutely no guarantee that the court ordered directive to the New York City School District to provide him with access to supervisory positions within the system (See: Chance, supra) will have any meaning; and he or she will remain on the proverbial merry-go-round.

In view of the foregoing discussion, Appellant submits that the Court below utilized erroneous burdens when it held that "the plaintiff must show by a preponderance of the evidence that the discharge occurred because he was a member of a minority group." See page 5 of the Memorandum and Order at page 87 of the Appendix.

The Appellant was required to go forth with the evidence and show certain things thereby establishing a prima facie case of racial discrimination. Thereafter, the burden shifted to Appellees who were required to rebut the inference of racial discrimination which automatically flowed from the prima facie case established through the evidence presented by the Appellant. The Appellees were required to establish their rebuttal, so to speak, in a clear and convincing matter, lest their defense be construed as a pretext and be rejected as legally insufficient to rebut the prima facie case of the Appellant. In order to avoid the latter, the Appellees were required to establish clearly and convincingly, that objective criteria were

utilized in evaluating the Appellant and in coming to the conclusion that the Appellant was totally incompetent as the principal of Intermediate School #33. Appellant submits that the Appellees failed to establish, in clear and convincing matter, the objectivity of their conclusion; and, accordingly, that they failed in rebuting the prima facie case which he successfully presented at the outset. Therefore, the reason the Appellees gave for terminating the Appellant from his position as principal of Intermediate School #33 could only be construed as a pretext for a racially discriminatory action; and a legal conclusion, otherwise, was erroneous and reversible.

Applying the aforementioned to the instant case, the Appellant initially established that: he was hired as principal of Intermediate School #33 in Brooklyn, New York School District #14 because he is a Black man; he was the first Black principal of a school in District #14; he was hired pursuant to an affirmative action effort of the Community School Board in District #14; he received satisfactory ratings for each of the two years prior to his termination; one of those satisfactory ratings was awarded to him by Appellee Rogers, himself; he could have received unsatisfactory ratings or doubtful ratings in his previous evaluations, including the same from Appellee Rogers; Community School District #14 is approximately 90 percent minority; and Intermediate School #33 is approxi-

mately 99 percent minority; and the Community School Board has six white members and three minority members (two Hispanic and one Black).

In addition, the Appellant successfully established that: at present, there are only three minority principals in District #14, including the person who replaced the Appellant and who was moved from a position in the central office of Community School District #14 where there are no minority professionals; the effect of his termination was disparate when considered in the context of the total number of minority persons holding supervisory positions in District #14 and in the context of Chance v. Board of Examiners, supra.

Moreover, the evidence in the Appellant's case established that: both professionals and lay persons testified that the Appellant was performing his duties in a highly competent manner, based on their personal observations of him and interaction with him.

Finally, the Appellant established that: white supervisory personnel were treated differently then the Appellant for similar and generally more serious allegations of misconduct; that a white probationary English teacher, who was, in fact, under the jurisdiction of the Appellant, was treated differently than the Appellant for alleged misconduct; that the Board laison to Intermediate School #33 did not feel that the situation at the school required the drastic action effected by the Community Board, based on his personal observations of the

school and inter-action with the Appellant; that Appellee Rogers observed the Appellant on very few ocassions; and that none of the Board members, save for Mrs. Fredericks, the Board laison to Intermediate School #33, ever discussed the situation at said School with the Appellant.

As such, the Appellant established by a preponderance of evidence, a prima facie case of institutional discrimination against him when he was fired under the circumstances, pursuant to the methods, and for the reasons described.

Having established his prima facie case, the Appellees presented the following evidence in rebuttal: that the Appellant was performing his duties incompetently and that the School was in a chaotic state. Said conclusion was arrived at by Appellee Rogers on an extremely limited number of personal visits to the School and on the more subjective evaluations of certain professionals.

However, the Appellees' rebuttal evidence established as well that: there are no objective criteria or procedures for evaluating supervisory personnel in the District; that the only criteria having a semblance of objectivity related to the number of fires and untoward incidences in the school, both of which were decreasing substantially at the time the Appellant was terminated. See: Testimony of Rogers at pages 511-515 of Appendix. In that regard, there had been no fires at the School for the two months previous to the Appellant's termination. Furthermore, the number of untoward incidences had

decreased from six the previous year to four in the year in which he was terminated. Moreover, the number of fires at the School, while they increased, did so only for a short period of time during the previous two school years. See: Testimony of Rogers at pages 511-513 of Appendix.

The evidence in this regard established, as well, that the Appellant took steps to monitor the halls and fire boxes in the School for the purposes of decreasing the number of fires and false alarms; and that said efforts were apparently having a salutory effect.

Moreover, the evidence established that the reporting of fires was different for different schools such that it appeared that a series of fires was reported as one fire at another school while the series of fires at Intermediate School #33 were reported individually and separately, thereby maximizing the number of fires at Intermediate School #33 while statistically minimizing approximately the same number of fires at another school. See: Testimony at page 518-521 of Appendix. See also: Exhibits at pages 842-894 of Appendix; Exhibit 17 in Record.

Furthermore, the evidence established that the Board laison to Intermediate School #33 was not overly concerned about the situation at said School (See: Testimony of Leroy Federicks at pages 343-344 of Appendix); and he had not been advised by other Board members or the Appellee Superintendent of any dissatisfaction or concern about the situation at Intermediate School #33.

Finally, the objective criteria of the scholastic standard of the School indicates that the reading scores at Intermediate School #33 were on the rise while the Appellant was principal

thereat, compared to other schools where the reading scores remained constant or decreased in level. See: Appendix at page 841.

Considering the same, there can be no other conclusion arrived at but that the Appellees failed to establish in a clear and convincing manner (by more than a perponderance of the evidence) that the Appellant was terminated for objectively based reasons. In fact, it appears that, of the very few objective criteria which came into play in this matter (fires, untoward incidences, scholastic standing-reading scores), the Appellant was functioning on a satisfactory, or at least improving, level at the time he was terminated.

Accordingly, the Court below was required to conclude, as a matter of law, that the reasons given by the Appellees for the Appellant's termination were pretextual, that is: they were subjectively based and inferentially racial, the latter as a matter of law in view of Chance, supra, in view of the fact that the Appellant is Black and was hired for that reason, and in view of the fact that the reason he was fired, to put it in perspective, was because the Appellee Superintendent did not like him.

If Black persons' rights, in an institutional setting, are to be gauged on whether or not white persons (who because they are white have benefited in this society by that fact as opposed to Black persons who because they are Black have

been disadvantaged by the fact in American society) in supervisory positions "like" and get along with Black persons whom they are evaluating and who, only just recently, have gained access to professional employment positions in the institutions of our society, Black persons will have no rights and will only be able to advance by ingratiating themselves to white persons who are in power. Surely, the Constitution and the interpretations of that document by federal courts are made of sturdier stuff than that; and, it being so, the District Court therein committed grievous reversible error in analyzing the evidence as it did and coming to the conclusion it did.

CONCLUSION

For the foregoing reasons, Appellant respectfully prays that the decision of the Court below be reversed; and that the cause be remanded to the District Court with direction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

James I. Meyerson, one of the attorneys for the Appellant, certifies that on the 25th day of April, 1975, I did serve a copy of the foregoing Brief and the Appendix thereto upon the Appellees by leaving a copy of the same with their attorney, to wit: Office of the Corporation Counsel, City of New York, Municipal Building, 15th Floor, New York, New York 10007.

Respectfully submitted,

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